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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of

Telephone company-cable television
cross-ownership rules,
Sections 63.54 - 63.58

and

Amendment of Parts 32, 36, 61, 64
and 69 of the Commission's Rules to
establish and implement regulatory
procedures for video dialtone services

87-266
CC Docket No. 82-266

RM-8221

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REPLY COMMENTS OF THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

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REPLY COMMENTS OF THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

The Association of Independent Television Stations, Inc. (INTV), hereby submits reply comments in the above-captioned proceeding. The *Third Further Notice of Proposed Rulemaking* raises important issues regarding the relationship between the federally authorized off-air television system and the new wire-based delivery systems.¹ Unfortunately, the architecture of these new systems remains unknown and may not be uniform across the country. As a result, establishing a complete set of safeguards becomes a difficult task. This proceeding should be the beginning of an ongoing regulatory process.

¹Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking in CC Docket No. 87-266, RM-8221, FCC 94-269, (released November 7, 1994), (herein after cited where appropriate as "Memorandum Opinion and Order" or "Third Further Notice").

I. BACKGROUND AND ISSUES OF CONCERN

While video dialtone is a new and emerging technology, the issues confronting the Commission regarding the interface between a wire-based video technology and over-the-air television broadcasting are not. The Commission has had several decades to explore the fundamental policy question. To this end, INTV urges the Commission to remember its experiences with cable television when establishing the rules governing video dialtone services and the carriage of over-the-air television stations.

As we have learned with the cable industry, significant anticompetitive incentives arise when the owner of a wire-based medium has a financial interest in programming that is delivered over the wire. In the instant case, system architecture and transport costs can be manipulated to favor programming, in which the wire-based facility has a financial interest, at the expense of other independent programmers.

Anti-competitive incentives are not eliminated simply because a local exchange carrier is prevented from direct ownership of video programming services distributing directly to subscribers. Even so-called independent video programmers, providing programming directly to subscribers, may receive anticompetitive, preferential

treatment if they are carrying programming that is owned by the telephone company.²

INTV simply disagrees with the Commission that the incentives to discriminate will disappear with the expansion of system capacity. Our experience with cable belies this assumption. The incentive to discriminate is based on a desire to make sure that viewers see programming and advertising in which the wire-based system has a financial interest. Nevertheless, the incentive to discriminate becomes most acute when there is a capacity shortfall. Despite earlier projections that video dialtone systems would offer unlimited capacity, it now has become apparent that many video dialtone systems do not plan to accommodate all of the programmers seeking access to the system, especially with respect to analog capacity.

The discriminatory incentives introduced into the video dialtone model require the Commission to be extremely careful when enacting safeguards. Off-air television broadcasting is not just

² This is precisely the scenario the FCC has created. For example, the Commission has clarified that the cross ownership rules do not prohibit LECs from owning video programming, even programming that another independent programmer provides over the LEC's video dialtone system. This policy, by itself, will create significant incentives to favor those video program services that are carrying programs owned by local exchange carriers. Moreover, the Commission has increased the potential for discrimination by relaxing several rules concerning the relationship between local exchange carriers and video programmers providing services directly to households. See *Third Further Notice* at paras. 74, 87-102.

another video programmer seeking access to the wire. Our nation's system of over-the-air television broadcasting serves all Americans, rich and poor, urban and rural. This is important not just for those who will be subscribing to video dialtone systems. As Congress observed in passing the 1992 Cable Act, wire-based systems can effectively undermine this nation's off-air television infrastructure. Those Americans not subscribing to a wire-based system will be hurt the most, if off-air television broadcasting is placed in jeopardy. These considerations should guide the FCC as it addresses the issues raised in the *Third Further Notice*.

While video dialtone systems are different from cable systems both as to architecture and regulatory treatment, basic principles can be established. First, capacity should be sufficient to guarantee free access to the video platform for those local television stations requesting access. Second, local television stations should have the right to control the secondary transmission of their signals. Accordingly, those stations wishing to forego access rights to the platform should have the ability to negotiate with video program providers for retransmission consent. Finally, rules honoring the integrity of local television markets must be applied to new video dialtone systems. Carriage on these systems must reflect a local television station's market. Also, network non-duplication and syndicated exclusivity rules must apply. These basic principles should guide the FCC in resolving the specific issues raised in the *Third Further Notice*.

II. ISSUES RAISED IN THE *THIRD FURTHER NOTICE*.

A. Video Dialtone Systems Should Have Sufficient Capacity To Meet the Demands of Local Commercial Television Stations.

The *Memorandum Opinion and Order* provides that telephone companies wishing to offer video dialtone service must make available a basic common carrier platform offering sufficient capacity to serve multiple video programmers.³ Nevertheless, the Commission modified its expandability requirement stating that, "it would not be reasonable to require LEC's to expand to meet all demand, regardless of technical and economic considerations."⁴

The Commission should clarify that, at the very least, proposals must include sufficient capacity to accommodate all local off-air television stations that request transport on the video platform.⁵ This policy is eminently reasonable. It is not a situation where a local exchange carrier is being asked to expand capacity for a potential non-existing service. The services provided by local television stations already exist in each local

³*Memorandum Opinion and Order* at para. 33

⁴*Id* at para. 38.

⁵As explained, *infra*, a station would be considered to be a "local" station on video dialtone systems that are located within a station's dominant viewing area. In the past this has been determined by Arbitron Ratings Analysis. Given the fact that Arbitron no longer publishes television market analysis, it should be based on Nielsen's Designated Market Areas (DMA).

market. Failure to provide sufficient capacity to meet this demand should be considered unreasonable by the Commission.⁶

Requiring sufficient capacity to meet the needs of local commercial television stations is consistent with existing common carrier law. Even in cases where capacity shortages have occurred, the FCC has required carriers to apply reasonable allocation criteria. Allocations on a first come, first served basis and allocations by lottery have been approved. See e.g., *Metrock Corporation*, 73 FCC 2d 802 (1979); *RCA American Communications Inc.*, 79 FCC 2d 331 (1980).

Significantly, existing law permits broader public policy and public interest factors to be considered by the FCC in its review of a carrier's proposal for allocation of scarce facilities. In *RCA American Communications, Inc.*, 86 FCC 2d 164, 173 (1981), the FCC looked to the "particular characteristics and circumstances" and FCC policies relating to the domestic communications satellite market. It found that the a "right of notice and of first refusal" in a carrier's contract with a customer was not unreasonable under the act. Because the contract expanded available service in the developing domestic satellite industry, which the FCC was

⁶As to technical feasibility, INTV does not profess to be an expert on the technical aspects of video dialtone systems. Nevertheless, for years the telephone companies have trumpeted the wonders of this technology. Therefore, it is difficult to believe that a video dialtone system would somehow have technical limitations in delivering the signals of television stations to consumers.

encouraging at the time, it was considered reasonable under the FCC's "broad power" to determine whether a preference was "reasonable under Sections 201(b) and 202(a) of the Act." Similarly, the particular characteristics of the MMDS market also played a large role in the FCC's decision in *Metrock Corporation*, *supra*.

Accordingly, consideration of the FCC's policies relating to free, universal over-the-air broadcast services is an appropriate requirement when reviewing a carrier's allocation scheme and for possible capacity shortfalls. First, since its inception, the Commission has promoted localism with respect to the provision that news and information is to be distributed to the American public.⁷ This policy is reflected in the television allocations scheme and remains a cornerstone of its regulatory efforts.

Second, it provides a principled approach to the question of how wire-based delivery systems should interface with the government's investment in our system of local, off-air television broadcasting. Requiring sufficient capacity, shared or otherwise, will insure that those subscribing to video dialtone services will be able to receive these signals. More importantly, however, it will insure that the off-air system of allocations will remain in place for those Americans that do not subscribe to the new wire-based delivery systems.

⁷47 U.S.C. Section 307(b).

Finally, requiring sufficient capacity at the outset will avoid a significant regulatory dilemma for the Commission. The very issues raised in the *Third Further Notice* evidence the difficulty in adopting an allocations regime that is consistent with basic common carrier concepts. Failing to require sufficient capacity at the outset will exacerbate problems as systems go on-line.

B. Channel Sharing Proposals

Conceptually, channel sharing may be an efficient means of utilizing analog capacity in the short run. As explained in the notice, channel sharing would involve transport on a designated "shared" channel. Video programmers leasing capacity on the video dialtone system would then be able to access the shared channel and make it part of the service offering. Presumably, the consumer would be presented with a seamless system whereby they could switch from shared channels to other program offerings provided by a programmer customer leasing capacity on the video platform.⁸

⁸Unfortunately, the *Memorandum Opinion and Order* does not specifically address issues regarding potential discrimination with respect to menus or navigational aids. Our channel positioning problems with cable systems taught us that wire-based systems can use the system's architecture to make it difficult, if not impossible, for consumers to find local television stations. In the cable context, this problem was addressed through channel positioning requirements. Similar safeguards should be enacted for video dialtone systems.

The decision to be placed on a shared channel should rest with the local television station. To the extent that channel sharing will make analog capacity more efficient, there should be sufficient capacity to place all local commercial stations on shared channels if they so desire. Stations should not be forced on these channels against their will.

INTV has grave concerns about permitting video program providers to act as managers or facilitators of shared channels. As noted above, video program providers may be direct competitors to local television stations with respect to reaching audiences and as a source of local advertising. Permitting these video distributors, as a group, to act in concert regarding the channel placement of local television stations could result in government sanctioned anti-competitive activity. The Commission, itself, has recognized the potential for abuse, but seriously underestimates the severity of the problem.

Also, permitting the local exchange carriers to make these decisions raises significant anti-competitive and discrimination concerns. Local exchange carriers can have ownership interests in programming. Presumably, they will want to attract the largest audience possible to view these shows. Accordingly, a LEC manager could act to favor those programming services that are carrying LEC owned programming. If the Commission is to retain the video

platform as common carrier, then the local exchange carrier should not have the ability to decide which programmers are able to utilize shared channels.

III. LOCAL COMMERCIAL TELEVISION STATIONS SHOULD RECEIVE PREFERENTIAL RATE CONSIDERATION.

Preferential rate treatment is neither new to common carrier law, nor is it proscribed by the Communications Act. The current provisions of Title II contemplate preferred rates for certain classes of users. Section 201(b) expressly permits carriers to charge different rates for different classes of customers of like facilities.

[C]ommunications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government or and other such classes as the Commission may decide to be just and reasonable, and different charges may⁹ be made for the different classes of communications...

For example, special "press" rates for private line teletypewriter services used by the wire services have been approved. See *Associated Press v. Federal Communications Commission*, 452 F.2d 1290 (D.C. Cir. 1971). The FCC may prescribe lower press rates. See *Swift and Co., Inc., v. United States*, 335 F.2d 788 (7th Cir. 1974). Factors justifying the imposition of press rates include the significant impairment of the dissemination of information in the absence of lower press rates. See e.g.,

⁹47 U.S.C. Section 201(b).

Copley Press, Inc. v. Federal Communications Commission, 444 F.2d 984 (D.C. Cir 1971); *World Press Freedom Committee*, 51 RR2d 34 (1982).

The justifications for establishing free access for local commercial broadcast stations closely parallel the justifications for press rates. As we found in the cable context, requiring local television stations to pay for access resulted in many stations being denied access to the wire. Local stations simply could not afford it. In fact, the 1992 Cable Act specifically prohibited this practice. Lack of access to the video platform means that the dissemination of vital information (local news, public affairs programs, Emergency Broadcast) will be impaired. The dissemination of information will be impaired not only to those subscribing to video dialtone services, but also to those who rely solely on off-air television signals.¹⁰

On balance, we believe there is ample precedent under the existing law to require free access to the video platform for those television stations requesting it. As noted above, there are sound

¹⁰ The latter concern is extremely important. History has taught us that once consumers subscribe to wire-based services they do not retain their ability to access signals over-the-air. As a practical matter, the wire becomes the sole means of accessing off-air television signals. If a station is unable to access consumers subscribing to wire-based services it will not reach a significant portion of its audience. Such a result undermines a television station's economic foundation and prevents it from disseminating information to all citizens in the market. Those not subscribing to wire-based video dialtone systems will find their access to information significantly impaired.

policy considerations to treating local television stations as a unique class of service.

IV. VIDEO DIALTONE POLICIES SHOULD RESPECT THE INTEGRITY OF LOCAL TELEVISION MARKETS.

To date, the Commission has not focused on market integrity issues as they would apply to video dialtone systems. This omission should be corrected. As with wire-based cable systems, video dialtone systems have the potential for importing out-of-market television stations. For example, could a subscriber to Bell Atlantic's video dialtone system in the Washington, D.C. area access the signal of a television station located in Philadelphia? The failure to recognize the importance of local market integrity could seriously damage program distribution in broadcasting. Indeed, it could undermine both independent and network distribution mechanisms.

For over two decades the Commission grappled with this issue in the context of cable television. The solution was to enact rules for wire-based delivery systems that honored the exclusivity arrangements of local television stations.¹¹ Absent the network non-duplication and syndicated exclusivity rules, cable television could have undermined local off-air television. These rules should be applied to the video dialtone platforms.

¹¹*Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299 (1988), *recon. denied*, 4 FCC Rcd 2711 (1989), *aff'd sub nom.*, *United Video Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir 1989).

Similarly, the Commission has not addressed issues regarding the geographic scope of television station's carriage on video dialtone systems. After considerable debate, the 1992 Cable Act concluded that carriage rights should exist throughout a local television station's market. The relevant geographic market for these purposes is that area in which advertising is sold and for which programming is purchased. This market was defined in terms of a station's Area of Dominant Influence (ADI). A similar definition can be found in Nielsen's Designated Market Areas (DMA). Recent changes in the copyright law, defining local markets for the cable compulsory licence, provide further support for employing these market definitions.¹² Consistent with these principles, the FCC should ensure that off-air television stations are able to secure access on all video dialtone platforms located within the television station's local market area.

V. FCC SHOULD NOT ENACT ADDITIONAL WAIVER POLICES THAT ENCOURAGE TELEPHONE COMPANY BUY-OUTS OF "IN REGION" CABLE SYSTEMS.

For years the telephone industry and the government have promoted the concept that telephone company entry into the cable business is necessary to foster competition to existing cable systems. The goal has always been to create a two-wire competitive marketplace.

¹²See *Satellite Home Viewer Act of 1994*, Pub. Law No. 103-369 (1994) Section 3(b)

It is somewhat surprising, therefore, that the Commission would now seek comment on a waiver process that would undermine the goal of facilities based competition. Presumably, an in-region buy out would be permitted upon a showing that two wire-based multichannel services are not viable. Developing criteria to evaluate such proposals is an imprecise and complex task. Nevertheless, one fact is plain: The very existence of a waiver policy will thwart the building of competitive video dialtone systems. One can easily see scenarios developing where cable operators, facing competition from video dialtone, simply will decide to sell out to the telephone company under the theory that two wires cannot exist in the market. The Commission would then be forced to enter into a detailed market analysis to determine whether two wires could exist in a particular market.

No sound policy exists for creating a separate waiver process based on video dialtone systems. The current rural exemption to the cable telephone cross-ownership rules appears to be sufficient.¹³ Moreover, the Commission's cable telco cross ownership rules can be waived for good cause.¹⁴

VI. CONCLUSION

To date, the Commission has not adequately considered the impact of its video dialtone policies on the federally allocated

¹³47 C.F.R. Section 63.28

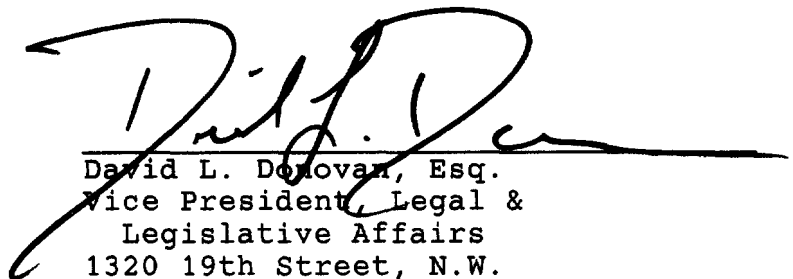
¹⁴47 C.F.R. Section 63.56.

over-the-air television system. Rules giving local television stations the choice of free access to video dialtone platforms or retransmission consent are the direct result of decades of regulatory experience with a competing wire-based delivery system. The geographic scope of a local television station's market should be preserved. In short, the Commission should learn from its experience with cable.

In any event, many of the issues raised in this comment cycle may have been superseded by the FCC's new Notice concerning telephone company ownership of cable systems and video program providers. In short, many of the "safeguards" discussed in the *Third Further Notice* will be insufficient if telephone companies program directly to subscribers. Because these issues are so inextricably linked, the FCC should consider issues raised in the *Third Further Notice* only after it has reviewed the record in its new proceeding.

Respectfully submitted:

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